MAR 5 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1339

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, ALLEN COUNTY

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IN THE

Supreme Court of the United States

No.

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, Robert Boyd, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered on December 5, 1973, which denied appeal from the Court of Appeals, Allen County, Ohio.

OPINION BELOW

The opinion of the Court of Appeals, Allen County, Ohio, Third Appellate Judicial District, is cited as *State v. Boyd*, 35 O. Ap. 2d 147, 300 N.E. 2d 752 (1973). The Ohio Supreme Court orders denying a hearing and a rehearing are set forth in Appendix D and E.

JURISDICTION

A timely petition for rehearing was denied by the Ohio Supreme Court on December 5, 1973, and this petition for certiorari was filed within ninety (90) days of that date.

Jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Is Ohio Revised Code 2905.34 and 2903.11 unconstitutional where the statutes do not specifically define or depict the proscribed sexual conduct as mandated by *Miller v. California*, 413 U.S. 13 (1973)?

2. Can a court retroactively apply the *Miller*, definition of obscenity or judicially construe the requisite specificity into the statutes at bar to uphold the conviction of the Petitioner whose conduct preceded *Miller*?

3. Can the State utilize a subpoena *duces tecum* to compel a defendant in a criminal case to produce evidence which might tend to incriminate him?

4. Can a magistrate "focus searchingly on the question of obscenity" in determining whether to issue a search warrant where his only source of information is conclusionary

hearsay statements with no showing of reliability, related to him by way of an affidavit from an affiant who has failed to observe the film?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and Ohio Revised Code Sections 2905.34 and 2903.11 are set forth in Appendix A.

STATEMENT OF THE CASE

On September 17, 1969, the Petitioner was arrested and later indicted for showing an allegedly obscene film trailer entitled "Starlet" in violation of Ohio Revised Code Sections 2905.34 and 2903.11. He was arrested at the Springbrook Drive-In Theatre in Lima, Ohio by members of the Sheriff's Department and Prosecutor's Office. The officers seized the film trailer depicting the coming attraction, "Starlet," pursuant to a search warrant (*See* Search Warrant, Appendix B). Neither the issuing magistrate nor the affiant viewed the film prior to its confiscation.

The Petitioner filed a timely motion to suppress which was overruled. Petitioner then filed for injunctive relief in the United States District Court in Toledo asking the court to order the Respondent to return the film due to the prior restraint resulting from the seizure. The film was ordered returned by the federal court. Respondent returned the film to the Petitioner coupled with a subpoena *duces tecum* ordering the Petitioner to bring the film with him to his trial. Petitioner filed motions to quash the subpoena *duces tecum*, to quash the indictment

and a demurrer. All motions were overruled by the trial court and affirmed by the Ohio appellate courts.

At trial, the trailer "Starlet" was admitted into evidence over Petitioner's objections. On May 20, 1971, the Petitioner was convicted of both counts of the indictment by the Allen County Court of Common Pleas and fined $2,000.00 on each count.

Notice of Appeal was filed on May 24, 1971. On July 19, 1971, the Court of Appeals dismissed the appeal for premature filing. The Supreme Court of Ohio reversed and remanded to the Allen County Court of Appeals on May 3, 1972.

The Allen County Court of Appeals on remand in an opinion rendered on December 18, 1972, affirmed the Court of Common Pleas decision.

Petitioner appealed the Allen County Court of Appeals decision to the Ohio Supreme Court. On April 6, 1973, the Supreme Court of Ohio overruled Petitioner's motion for leave to appeal.

After the decision of *Miller v. California,* 413 U.S. 13, Petitioner filed a supplemental motion requesting the Supreme Court to review the Constitutionality of the Ohio statutes involved at bar in light of *Miller.*

On December 5, 1973, the Supreme Court of Ohio denied a rehearing.

REASONS FOR GRANTING THE WRIT

The decision below raises significant Constitutional questions which have not been decided by this Court. Said

Constitutional questions have been decided inconsistently and without uniformity by various state and federal courts.

1. **OHIO REVISED CODE SECTIONS 2905.34 AND 2903.11 DO NOT MEET THE CONSTITUTIONAL MANDATES OF *MILLER v. CALIFORNIA*, 413 U.S. 13 (1973).**

On June 21, 1973, this Court handed down five companion cases dealing with obscenity. This Court reaffirmed its position that obscenity is not protected by the First Amendment, but additionally set forth a new criteria for determining whether a particular work is obscene (*See, Miller v. California*, 413 U.S. 13 (1973)). In *Miller*, this Court set forth the following renovated definition of obscenity:

> ". . . The basic guidelines for the trier of fact must be: a) whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; b) *whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law* and c) whether the work taken as a whole lacks serious literary, artistic, political or scientific value." (Emphasis added) *Id.* at 24, 25

After articulating this new criteria, this Court vacated and remanded the case for further proceedings consistent with First Amendment standards established by *Miller*. In all the companion "obscenity" cases decided that day, this Court remanded *all* of them for proceedings consistent with *Miller* (*See, Paris Adult Theatre I v. Slaton*, 413 U.S.

49 [1973]; *Kaplan v. California*, 413 U.S. 115 [1973]; *United States v. 12 200 feet reels of Film*, 413 U.S. 123 [1973]; *U.S. v. Orito*, 413 U.S. 139 [1973]).

After this Court handed down the aforementioned decisions, Petitioner filed a supplemental memorandum requesting the Ohio Supreme Court to review the Constitutionality of the Ohio statutes at bar in light of *Miller*. The Ohio Supreme Court refused.

A perusal of the Ohio statutes involved at bar shows that they do not meet the standards of *Miller*.

Ohio Revised Code Sections 2905.34 and 2903.11 in pertinent part read:

> (Ohio Revised Code Section 2905.34)
> ". . . No person shall knowingly sell, lend, give away . . . *an obscene, lewd or lascivious* book, magazine . . . motion picture film . . . or article of an *indecent or immoral* nature or a drug, medicine, article or thing intended for the prevention of conception. . ."
>
> (Ohio Revised Code Section 2903.11)
> ". . . No person shall knowingly sell, distribute, import, print or publish for the purpose of selling to a minor . . . a motion picture film or other thing which is *obscene or indecent or which manifestly tends to corrupt the morals of such youth.*"
>
> (Full text of statutes in Appendix)

These statutes (O.R.C. 2905.34 and 2903.11) fail to give adequate notice to Petitioner of what type of conduct is proscribed and do not specifically define the patently offensive conduct as required by *Miller*.

By failing to give Petitioner notice of the unsanctioned conduct, the State violated the Constitutional doctrine of definitiveness. This venerable doctrine states that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed (*See, U.S. v. Harris*, 347 U.S. 612 [1954]).

Miller, reaffirmed earlier decisions of this Court which have consistently applied the doctrine to the area of obscenity (*See, Rabe v. Washington*, 405 U.S. 313 [1972]; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 [1968]; *Winters v. New York*, 333 U.S. 307 [1948]).

Numerous federal and state courts in cases involving statutes similar to the ones at bar, have found them to be Constitutionally deficient in light of *Miller*.

In *Hamar Theatres v. Cryan*, 13 CRL 2449 (1973), a three-judge federal panel struck down the New Jersey obscenity statute for failing to meet the *Miller* criteria. A comparison of the New Jersey obscenity statute with the statute at bar shows the New Jersey statute to be much closer to the mandates of *Miller*.

In *Stroud v. State*, ___ Ind. ___, 300 N.E. 2d 100 (1973), the Defendants were found guilty of the sale of obscene material under Indiana law. After being vacated and remanded in light of *Miller*, the Indiana Supreme Court held the statute too general in light of the new standards enunciated in *Miller* (*See, Mohney v. State*, ___ Ind. ___, 300 N.E. 2d 66 [1973]; *McCright v. Olson*, No. 4849 [U.S.D.C. North Dakota, decided Dec. 7, 1973], held N. Dakota obscenity statutes unconstitutional in light of *Miller; Louisiana v. Shreveport News Agency, Inc.*, No. 53988 [La. Supreme Court, decided Dec. 1973], held Louisiana obscenity statutes unconstitutional in light of

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Miller; Iowa v. Wedelstedt, 1-56081 [Iowa Sup. Ct., decided Dec. 19, 1973], held Iowa statutes unconstitutional in light of *Miller*).

The Ohio statutory scheme at bar fails to meet the Constitutional requirements of specificity required by *Miller.* It is Petitioner's position that the Ohio obscenity statutes involved at bar are clearly too amorphous to support a criminal conviction in light of *Miller.*

Since the conviction at bar, the Ohio legislature has *twice* made the Ohio obscenity statutes the subject of extensive revamping. This legislative action is a tacit admission by the legislature that these previous statutes did not meet basic Constitutional guarantees.

Additionally, Petitioner submits that his conviction cannot be made to conform to the *Miller* dictates by judicially construing the requisite specificity into the statutes. Such a construction would violate the *ex post facto* mandates of the Constitution.

At the time of Petitioner's alleged illegal actions, the test of obscenity was the, now out-dated, *Memoirs* test. The prosecutor's burden of proof, as Chief Justice Burger noted in *Miller, supra,* was "a burden virtually impossible to discharge under our criminal standards of proof." It is obvious that the application of the new *Miller* standard to the Petitioner, whose actions took place under the *Memoirs* standard, would be a judicial *ex post facto* application of the law. Additionally, to allow the Ohio courts to now retroactively authoritatively construe the proscribed sexual conduct into Ohio Revised Code Sections 2905.34 and 2903.11 to meet the *Miller* standards would be to deprive the Petitioner of due process by denying him adequate notice of what constituted criminal acts. The court

in *U.S. v. Lang*, No. 10712, HP-CD (W.D. Calif., decided July 8, 1973), adopted this rationale and asserted that there is an *ex post facto* violation of any application of *Miller* standards to obscenity cases where the alleged violation took place prior to the *Miller* decision (*Also see, Rhodes v. State*, 14 CRL 2081 [Fla. 1973]).

This Court in *Bouie v. Columbia*, 378 U.S. 347 (1964), recognized the invalidity of utilizing a subsequent judicial interpretation to convict a defendant for conduct which preceded the judicial construction. The Court declared:

> ". . . Indeed an unforeseeable judicial enlargement of a criminal statute, applied retroactively operates precisely like an *ex post facto* law, such that Article I, Section 10 of the Constitution forbids." *Id.* at 353.

Although Petitioner submits it would be unconstitutional for the Ohio court to authoritatively construe the statutes at bar to meet the *Miller* test, it must be noted that the Ohio Supreme Court in denying a hearing to Petitioner *has not* authoritatively construed these statutes and minimally this case must be remanded to them for an authoritative retroactive construction.

2. THE STATE CANNOT UTILIZE A SUBPOENA *DUCES TECUM* TO COMPEL A DEFENDANT IN A CRIMINAL CASE TO PRODUCE EVIDENCE WHICH MIGHT TEND TO INCRIMINATE HIM.

At bar, the Respondent forced the Petitioner, through use of a subpoena *duces tecum*, to present to the court a movie which was used as evidence to secure his conviction. This was done in contravention of the express wording of the Fifth Amendment.

The Fifth Amendment has been interpreted numerous times by this Court to mean that a Defendant in a criminal proceeding cannot be required either directly or indirectly to testify against himself nor can his books or papers be made to speak against him (*See, Boyd v. United States,* 116 U.S. 616 [1885]; *Lees v. U.S.,* 150 U.S. 476 [1893]; *Gilbert v. California,* 388 U.S. 263 [1967]; *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385 [1920]; *U.S. v. White,* 322 U.S. 694 [1944]).

In the landmark case of *Boyd, supra,* this Court held that the compulsory production of a man's papers to be used as evidence against him is equivalent to compelling him to be a witness against himself and is prohibited by the Fifth Amendment.

This Court in *Couch v. United States,* 409 U.S. 322, (1973), again upheld the sanctity of the Fifth Amendment:

> ". . . The Constitution explicitly prohibits compelling an accused to bear witness against himself. . . Compulsion upon the person asserting it is an important element of the privilege and prohibition of compelling a man to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him. It is the extortion of information from the accused himself that offends our sense of justice." *Id.* at 328.

Despite the commands of this Court (*Also see, U.S. v. Cohen,* 388 F.2d 464 [CA. 9, 1967]; *U.S. v. White,* 477 F.2d 757 [CA 5, 1973]), prosecutors throughout the country have attempted to procure obscenity convictions through the use of a subpoena *duces tecum* to produce the main evidence. The California Court of Appeals in *People v.*

DeRenzy, 79 Cal. Rptr. 777 (1969), in discussing a similar problem as the one at bar, stated:

> ". . . any court process designed to compel production of the questioned material would obviously infringe on the possessor's Fifth Amendment rights." (*See, Boyd v. U.S.*, 116 U.S. 616, 634-635). *Id.* at 779.

The Louisiana Supreme Court, citing *Boyd* and *DeRenzy*, stated:

> ". . . any court process addressed to a prospective Defendant compelling him to produce the evidence which would convict him of a crime would violate the Fifth Amendment right against self-incrimination." 264 So.2d 615, 619.

(*See also, Bryers v. State*, 480 S.W. 2d 712 [1972]; *Cummings v. State*, 480 S.W. 2d 704 [1972]).

The Pennsylvania Supreme Court in *Commonwealth v. Polak*, 438 Pa. 67, 263 A.2d 354 (1970), also disallowed the use of a subpoena ordering a defendant to bring in incriminating evidence (movies) to court.

In Ohio and Arizona, this issue has caused inconsistency and confusion between the state and federal courts. The Arizona Supreme Court in *Anderson v. Coulter*, 499 P.2d 103 (Ariz., 1972), cert. denied, 410 U.S. 990 (1973), permitted the use of a subpoena to compel the defendant to bring in incriminating evidence for use in his criminal trial. However, the U.S. District Court of Arizona in *Russell v. Blubaum*, No. CIV-73-319 PHX WEC (1973), specifically rejected *Anderson*, and held that a subpoena *duces tecum* could *not* be utilized to compel a defendant to produce motion picture film in a judicial proceeding.

In a case emanating from the same district as the case at bar, the Federal Court in *Smith v. Fair*, 363 F. Supp. 1021 (1973), held that the use of a subpoena *duces tecum* to compel a defendant to produce a motion picture film for a judicial hearing was violative of his Constitutional right against self-incrimination (*Also see, Maley v. Honorable James R. Meyers*, U.S. Dist. Ct., West Div. Texas, Waco Division, Civil Action No. W-73-CA 87 [Dec. 20, 1973], rejects *Anderson* rationale).

By this procedure, which the Arizona and Ohio Supreme Courts find permissible, the State could subpoena in, without probable cause, evidence which was suspected of being used in the commission of a crime. This procedure would provide the State with evidence of a testimonial or communicative nature to incriminate the unfortunate Defendant. The situation becomes more critical in cases where free speech material is involved as the State is actively hollowing the First and Fifth Amendments. This unconstitutional government assault against the individual by subpoenaeing incriminating evidence is unnecessary as the State can effectively gain the evidence and prosecute under the procedures enunciated in *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973). These cases set up a workable procedure where a motion picture could be secured for use in a judicial proceeding. These procedures make no mention of a subpoena *duces tecum*. These decisions strike an artful balance between prior restraint and the right of a State to obtain evidence for use in a judicial proceeding without having to violate a Defendant's Fifth Amendment rights.

At bar, the State, through the ploy of a subpoena *duces tecum*, ordered the Petitioner to bring into court the very film which was the main evidence used to convict him. It

is hard to picture a more blatent violation of Petitioner's Fifth Amendment rights. The court has long recognized this Fifth Amendment privilege and to allow the State, through legal extortion, to force the individual either to incriminate himself or be jailed for contempt would be a "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality" (*Ullman v. U.S.*, 350 U.S. 422, 428 [1956]).

3. THE PROCEDURE UTILIZED FOR THE ISSUANCE OF THE SEARCH WARRANT DID NOT MEET THE CONSTITUTIONAL REQUIREMENTS NECESSARY FOR A FREE SPEECH SEIZURE AS ENUNCIATED IN *LEE ART THEATRE v. VIRGINIA*, 392 U.S. 636 (1968).

It is maintained that the procedure employed at bar for the issuance of a search warrant for First Amendment materials did not provide the stringent safeguards that are Constitutionally required for such seizures.

The trailer "Starlet" had been seized pursuant to a search warrant. The affiant to the search warrant *did not* personally see the film before its confiscation. The basis for the issuance of the warrant was hearsay received from two informants.

In a case in a similar vein, *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), a search warrant was issued pursuant to an affidavit of a police officer who *viewed* the movie. This Court reversed and remanded, stating:

> ". . . The procedure under which the warrant was issued was solely upon the conclusionary assertions of the police officer without any inquiry by the Justice of Peace into the

> factual basis for the officer's conclusions was not a procedure designed to focus searchingly on the question of obscenity and therefore fell short of the Constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.* at 637.

At bar, the affiant did not even view the film trailer, while the officer in *Lee Art Theatre* at least viewed the film, but as was noted above, this was found Constitutionally deficient as a basis for seizure of First Amendment materials.

Additionally, the search warrant failed to meet the requirements of *Spinelli v. U.S.*, 393 U.S. 410 (1968), and *Aguilar v. Texas*, 378 U.S. 108 (1963), which require the following criteria in order for an affidavit for a search warrant based on hearsay to be valid: 1) a basis for concluding the informants were reliable; 2) a sufficient statement of the underlying circumstances from which the informants concluded (in this case) the Petitioner was showing an obscene motion picture.

In the search warrant at hand, there were two informants; the affidavit is devoid of any showing of past or present reliability. There is not even the perfunctory statement that the informants were reliable. There is no mention as to any previous reliability in determining the obscenity of movies or any underlying circumstances from which a magistrate could "focus searchingly on the question of obscenity" (*See, Marcus v. Search Warrant*, 367 U.S. 717, 732 [1961]; *U.S. v. Santiago*, 424 F.2d 1047 [1970]). This Court in *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), set up preferential treatment for search warrants' seizures involving

First Amendment protections. Stricter standards are required for search warrants involving free speech materials.

The problems that can arise with the allowance of hearsay informants as a basis for free speech seizures is shown at bar, as the facts recited in the search warrant affidavit are inaccurate when applied to the film in question. Obscenity is an emotional issue where personal attitudes can easily influence an individual's perception of their observations. To base a search warrant on an hearsay informant's conclusionary statements, with no showing as to the specificity of the acts allegedly observed and then have the affiant relate their impressions by way of an affidavit to a neutral magistrate without any distortion of the facts is contrary to common sense. To expect a magistrate with only this information before him to "focus searchingly on the question of obscenity" is an unrealistic hope.

If free speech material is to have the protection guaranteed it by the Constitution, there must be a "higher hurdle of reasonableness" (*See, Roaden, supra*) reached before a search warrant is issued.

Statements by hearsay informants, without a showing of reliability, do not provide the requisite information for a magistrate to make a determination as the obscenity of the Constitutionally protected materials. This process did not leap the higher hurdle of reasonableness required for a warrant involving prior restraint of the right of expression as mandated by *Lee Art Theatre, Marcus,* and *Roaden.*

CONCLUSION

Therefore, in consideration of the foregoing, a writ of certiorari should issue to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when an actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall his private property be taken for public use, without just compensation."

(O. R. C. 2903.11)

"No person shall knowingly sell, distribute, import, print, or publish for the purpose of selling or distributing to a minor under the age of eighteen, nor shall knowingly introduce, or have intentions of introducing into a family, school, or place of education for the purpose of sale, exhibition, loan, or circulation to a minor under the age of eighteen, nor shall knowingly buy, procure, receive, or have in his possession for the purpose of sale, exhibition, loan, or circulation to a minor under the age of eighteen any book, pamphlet, ballad, printed paper, phonographic record, print, picture, figure, image, description, motion picture film, or other thing which is obscene or indecent or which manifestly tends to corrupt the morals of such youth.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

(O. R. C. 2905.34)

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

APPENDIX B

THE FOLLOWING BLANK HAVE BEEN APPD. BY ATTY. GEN., OHIO. C130-2

SEARCH WARRANT

Rev. Code 2933.23
Gen'l Code 13430-3

In the Lima Municipal Court, Lima, Ohio
~~Court of Common Pleas~~

No.

The State of Ohio, Allen County, ss.

To the Sheriff of Allen County, Ohio, GREETINGS:

Whereas there has been filed with me an affidavit, of which the following is a copy:

Before me, LAWRENCE S. HUFFMAN, a Notary Public in and for said County and State *personally appeared* WILLIAM H. DAILEY, JR. *who, being first duly sworn according to law, deposes and says that he has good cause to believe and does believe that the offense of*

knowingly exhibiting an obscene, lewd and lascivious motion picture film in violation of Section 2905.34 of the Revised Code of Ohio *has been committed and that the person responsible has never been placed in jeopardy therefore; that the following things and/or persons for which search authorization is sought, to-wit:*

one motion picture film trailer for a moving picture called "Starlet"

is/are concealed in the building of the Springbrook Drive-In Theater

Affiant further avers the facts upon which such belief is based are:

see attachment

The things and/or persons to be seized are: one motion picture film trailer of the moving picture entitled "Starlet" and the person of Robert Boyd, who exhibited said film on the 13th day of September, 1969.

/S/ William H. Dailey, Jr.
Affiant

Sworn to before me and subscribed in my presence this 17th *day of* September, 1969.

/S/ Lawrence S. Huffman
Notary Public, State of Ohio

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the night time into the building of the said Springbrook Drive-In Theater of the Township of Bath in the County aforesaid, and there diligently search for the said goods

and chattels, or articles, to-wit: one motion picture film trailer of the moving picture "Starlet"

and that you bring the same or any part thereof, found on such search and also the body of Robert Boyd

forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this 17th day of September, 19 69.

Roger D. Andrews, Judge, Title
Lima Municipal Court
Lima, Ohio
Deputy Clerk

1. "daytime" or "nighttime" as the case may be.
2. If applicable, insert: "and also the body of_____."

SHERIFF'S RETURN

Sheriff's Office, *County, Ohio,* , 19

Received this writ on the *day of* , 19 , at o'clock

M., and pursuant to its command I executed the same on the *day of*

19 , *by searching the premises therein described for the persons and/or things therein set forth in the* [1]_____ *time of said day*

whereupon I did seize the following things and/or persons, to-wit:

and now have them before the Court.

SHERIFF'S FEES	
Service and Return	
Mileage_____miles at 8c	
Total	

Sheriff

By_____
Deputy Sheriff

1. "day" or "night."

No._____
Page_____
Dkt._____
Page_____
Record_____

COURT OF COMMON PLEAS
In the Lima Municipal Court, Lima, Ohio

In the Matter of the Search of
The Building of the Spring-brook Drive-In Theater
R. D. #3, Lima, Ohio

SEARCH WARRANT

Returned and Filed
, 19
Clerk
By_____ Deputy Clerk

(Sign as Copy to be Served only.)
I certify this to be a true copy of the original order and of the endorsements thereon.

Sheriff
By_____ Deputy

Affiant further avers the facts upon which such belief is based are: information from E. L. Stringfield, 3364 Allentown Road, Lima, Ohio, that he had viewed an exhibition of a motion picture film trailer on September 13, 1969 and that said film was in color and showed a nude woman with the private parts of her body exposed; that said film depicted a nude couple engaged in sexual relations and that said film showed a nude female committing an act of oral sodomy upon a nude male.

Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture "Starlet" on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969.

APPENDIX C

Subpena Duces Tecum

CRIMINAL CASE.
Revised Code, Sec. 2935.05

The State of Ohio, Allen County. Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena Robert Boyd

to be and appear before the Common Pleas Court at the Court House in said County, on the 9th day of December A. D. 19 70 at 9:00 o'clock A. M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes. Robert Boyd;

and also to bring with him, and produce at the time and place aforesaid

one (1) reel approximately 630' of 35 mm color film, being a trailer for the motion picture known as "Starlet" the same now being in your possession

; and not depart the Court without leave.

And therein to fail not, under penalty of the law; and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State.

WITNESS my hand and the seal of said Court, this 23rd day of October 19 70

Robert H. Dunlap
Clerk

By Virginia Belogarlovich
Deputy

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 73 TERM
To wit: April 6, 1973

State of Ohio,
Appellee,

vs.

Robert Boyd,
Appellant.

No. 73-183

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for ALLEN *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Jack Gallon

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of ____ 19____

____ *Clerk*

____ *Deputy*

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Robert Boyd,
Appellant.

19 73 TERM

To wit: December 5, 1973

No. 73-183

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.____ Page____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 5th *day of* December, *19* 73

THOMAS L. STARTZMAN *Clerk*

By _____ *Deputy*

APPENDIX F

IN THE COURT OF APPEALS OF
THE THIRD APPELLATE JUDICIAL
DISTRICT OF OHIO,

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT BOYD,
Defendant-Appellant.

MEMORANDUM OPINION

(No. 1450 – Decided: December 18, 1972.)

APPEAL: Court of Appeals for Allen County.
MR. TED IORIO, for Appellant.
MR. LAWRENCE S. HUFFMAN, Prosecuting Attorney, for Appellee.

GUERNSEY, J. This is an appeal by the defendant, Robert Boyd, from a judgment of the Common Pleas Court of Allen County, Ohio, convicting and sentencing him for a violation of R.C. 2903.11, (130 v 658) in that on September 13, 1969, he "did unlawfully and knowingly have in his possession for the purpose of exhibition to a minor under the age of eighteen years, a motion picture film which is obscene, indecent, and which manifestly tends to corrupt the morals of such youth," and for a violation of R.C. 2905.34, (131 v 673), in that on September 17, 1969, he "did unlawfully, and knowingly, have in his

possession and under his control an obscene, lewd and lascivious motion picutre film for the purpose of exhibition and dissemination of said obscene, lewd and lascivious motion picture film."

It appears undisputed in evidence, among other things, that Boyd was, on both dates, the manager of an outdoor movie theater located near Lima, Ohio; that on the earlier date he caused to be exhibited in the time interval between the showing of two feature films and together with other associated advertising material advertising coming attractions a film trailer of approximately ten minutes duration advertising the movie "Starlet"; that the trailer depicted, or graphically suggested, the happening of a variety of sexual acts occurring between both those of the opposite and of the same sex and was accompanied by a matching sound track replete with double entendre aiding in the suggestion of what one might conclude the acts depicted as portraying; that neither in the newspaper advertising of the theater, nor on the premises thereof was any mention made that anything of such nature was to be shown that evening or that the audience should be in any manner restricted; that no other forewarning was given of the showing of the trailer; that in one car and seeing the trailer shown were three boys of less than eleven, nine and seven years of age, respectively, in another car and seeing the trailer shown was a boy of eleven years of age, and in the theater were many other young children as well as adults; that on September 17, 1969, Boyd was met on the steps of the projection booth of the theater by a deputy sheriff, was handed a search warrant for the trailer, which Boyd then got from the floor of the projection booth, instructed the projectionist to remove advertising clips from it, which was then done, and the film trailer was then taken into possession of the deputy sheriff; that the film trailer was

subsequently returned to Boyd pursuant to order of a federal district court and concurrent with its return a subpoena duces tecum was served on Boyd to produce the film at the trial of the charges against him.

In his appeal, Boyd makes give assignments of error which we will consider in the chronology of the trial.

Assignment of Error No. II. "The trial court erred in permitting the introduction into evidence of the motion picture trailer "Starlet" because it was seized without a prior adversary hearing having first been held and pursuant to an invalid search warrant."

Assignment of Error No. III. "The trial court erred in overruling appeallant's motion to quash a subpoena duces tecum requiring him to bring into court the motion picture trailer "Starlet" which was then admitted into evidence."

We consider these two assignments of error together because they involve, in their essentials, much of the same matter, the argument being that the trailer was illegally seized, properly returned by the federal court, and once ordered returned could not be ordered produced pursuant to subpoena duces tecum. To dispose of these contentions we need only assume, without deciding, that the defendant is right in his contention that evidence ordered returned because illegally seized may not be ordered produced pursuant to such subpoena. However, it does not follow that evidence which has been legally seized and then returned may not be ordered produced pursuant to such subpoena.

We have examined the decisions of the United States Supreme Court carefully, with particular emphasis on its decisions in the cases of Marcus v. Search Warrant (1961),

367 U.S. 717; A Quantity of Books v. Kansas (1964), 378 U.S. 205; and Freedman v. Maryland (1965), 380 U.S. 51, and notwithstanding that these cases set forth limitations on seizure *as contraband* and for destruction we find no decision which would indicate that one copy of a film alleged to be obscene may not be seized without a prior adversary hearing to be used *as evidence* in a prosecution for its possession. The Supreme Court of Ohio has recognized this distinction in State v. Albini (1972), 31 Ohio St. 2d 27, where it held:

> "Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidence to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

We find this case decisive of the issue of prior adversary hearing, and as it is consistent with the holdings of the United States Supreme Court we are not in the position of following a decision of the Ohio Supreme Court in the face of a different decision on the same issue by the United States Supreme Court.

Defendant further contends, however, that the search warrant was insufficient because the affiant "did not see personally the trailer "Starlet" before its confiscation" and "relied on the hearsay information received from two informants." Admittedly the affiant who obtained the search warrant was not prior to executing his affidavit a

witness to the showing of the film trailer in question and his affidavit contained the following with respect to his informants:

> "Affiant further avers the facts upon which such relief [the concealment of the obscene movie trailer] is based are: information received from E.L. Stringfield, 3364 Allentown Road, Lima, Ohio, that he had viewed an exhibition of a motion picture film trailer on September 13, 1969, and that said film was in color and showed a nude woman with the private parts of her body exposed; that said film depicted a nude couple engaged in sexual relations and that said film showed a nude female committing an act of oral sodomy upon a nude male.
>
> "Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture 'Starlet' on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969."

State v. Joseph, 25 Ohio St. 2d 95, 54 O.O. 2d 228, sets forth the criteria for the sufficiency of Ohio search warrants as tested against federal constitutional standards regarding probable cause prescribed by the United States Supreme Court. The Ohio Supreme Court concluded that the test which we are bound to apply is set forth in Aguilar v. Texas (1964), 378 U.S. 108, 114-115:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable' . ***"

Although there is nothing in the paragraph in the affidavit referring to informant Springfield to identify the film trailer by name or to show where he had viewed its exhibition, the paragraph in the affidavit relating to informant Jackson not only shows the character and identity of the film trailer and where it had been seen and kept, but identifies Jackson as "Bath Township Constable", a person whom the magistrate as well as the affiant could conclude would be credible in the observations which were related as being made by him and whose information in such respect would be reliable. The affidavit meeting the standards set forth in *Aguilar* we need not be, and are not, concerned with the defendant's claim that the affiant did not personally see an exhibition of the film trailer before seizing it.

Concluding that the search warrant affidavit was sufficient and that no prior adversary hearing as to the obscene character of the film trailer was necessary we also conclude that the defendant has not shown any illegality in the search and seizure. That being the case, it follows that the required production of the film by virtue of a subpoena duces tecum was not in any manner violative of defendant's rights.

Assignment of Error No. V. "The trial court erred in overruling appellant's motion to quash the indictment since the indictment does not afford a record whereby the appellant could successfully assert a plea of double jeopardy."

This assignment refers to a claimed absence from the indictment of a grand jury finding of obscenity, or of any of the elements constituting obscenity, and an absence therefrom of any name or identification of the motion picture film involved.

Each of the counts of the indictment following the language of the statute and the second count thereof relating to possession (R.C. 2905.34) is further qualified by the language indicated by the requirements set forth in State v. Ross, 12 Ohio St. 2d 37. It is the general rule that an indictment in the language of the statute creating and defining the offense on which the prosecution is based is sufficient. In view of the language actually used in the indictment it cannot be reasonably contended that the grand jury failed to find that the film involved was obscene. Finding the whole, it was not necessary for it then to find the separate elements of obscenity.

The claim that the form of the indictment would deprive the defendant of a future plea of double jeopardy has no validity for under the provisions of R.C. 2943.06, the issue of former jeopardy "shall be tried to a jury, and on

such trial the defendant must produce the record of such conviction, acquittal, or jeopardy, and prove that he is the person charged in such record, and *he may also introduce other evidence to establish the* identity of such offense." (Emphasis added.) This statute adequately protects the defendant against the problem which he envisages arising from the failure of the indictment to more fully identify the movie trailer.

Assignment of Error No. I. "The court erred in finding the motion picture "Starlet" obscene."

Under this assignment, the defendant claims that the scenes shown in the subject film trailer are indistinguishable from the types of photography found to be protected by numerous decisions of the United States Supreme Court. When one considers the descriptions of the textual matter in books, of scenes depicted in photographs, and of the content of films, involved in cases where the Supreme Court of the United States has reversed obscenity convictions obtained in state courts it is difficult to know what is and what is not obscene in the view of the Supreme Court of the United States.

Although in September, 1969, the time of the occurrences from which arose the matters for which the defendant stands charged, there was no statutory definition of obscenity existing in Ohio, the Ohio Supreme Court had, nevertheless, arrived in the case of State v. Mazes, 7 Ohio St. 2d 136, 36 O.O. 2d 121, at its own definition based on the definition set forth and agreed to by a minority of the United States Supreme Court in the case of A Book v; Attorney General of Massachusetts (1966), 383 U.S. 413, 86 S. Ct. 975, at least with application to the obscenity of books. That definition arrived at by the Ohio Supreme Court was:

> "In order that a publication may be held to be in violation of Section 2905.34 of the Revised Code, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It must be recognized, however, that in the federal constitutional area involving the freedoms of speech and freedom of the press any definition of obscenity by a state court must yield to the decisions of the Supreme Court of the United States relating to such constitutional rights. But neither in A Book v. Attorney General of Massachusetts, *supra,* nor in any other case has a majority of the Supreme Court settled upon one definition of obscenity. See Requiem for Roth, 69 Mich. L. Rev. 185, and Sensenbrenner v. Adult Bookstore, 26 O. App.2d 183, 189, 55 O.O. 2d 342, 345. It must be concluded from the consistent and controlling application by the Court of the case of Redrup v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, in finding constitutional protection under the First and Fourteenth Amendments to the Constitution of the United States of books, photographs, and films at least as offensive as the film herein involved, that whether the material constitutes hard core pornography, or not, the distribution or exhibition of same is protected by these amendments unless (1) the statute in question in its application to the offense charged reflects a specific and limited state concern for juveniles or (2) there is suggestion of an assault upon individual privacy by publication in a manner

so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) there is evidence of the sort of "pandering" which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942. Thus, although a book, photograph or film might be considered obscene under the definition set forth in State v. Mazes, *supra*, it could be still constitutionally protected if the offense charged did not involve one or more of the exceptions set forth in the Redrup case.

Having viewed the film trailer "Starlet" and reviewed the rest of the record we are of the opinion that there was sufficient evidence of probative value to prove the film obscene under the three prong test set forth in State v. Mazes, *supra*, and alluded to in Redrup v. State of New York, *supra*. The record will not support a conclusion by this court, as a matter of law, that the film trailer was not obscene, as so defined. The film being obscene, are the offenses charged then within any of the exceptions to the operation of the Redrup case?

R.C. 2903.11, the statute under which the first count of the indictment was founded was amended as part of an act "relative to the dissemination of obscene matter to minors" (130 v 658, Amended Senate Bill No. 115) and is directed specifically and solely to prohibiting such dissemination. It therefore, reflects a specific and limited state concern for juveniles.

The offenses under both counts of the indictment occurred by the exhibition of the film trailer without warning to the entire theater audience at a time and under circumstances when it could be expected that they would be looking; indeed, under circumstances, the advertising of a coming attraction, where the defendant wanted them to be looking. The audience not being forewarned of what

was going to be shown the publication of the film was in manner so obtrusive as to make it impossible for any unwilling individual in the audience to avoid exposure to the film.

In Ginzburg v. United States, 383 U.S. 463, 467, 86 S. Ct. 942, 945, the Supreme Court defines pandering in terms set forth in Roth v. United States, 354 U.S. 495, 496, 77 S. Ct. 1314, 1315, as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." That case involved the question of the obscenity of a hardcover magazine, a bi-weekly newsletter and a short book and convictions for the violation of the federal obscenity statute were upheld in view of the defendant's pandering in their production and sale. Here, the question is not whether the full length movie "Starlet" was obscene because of the presence of pandering but merely whether the advertising therefor, the film trailer "Starlet", was obscene. Although the trailer may have constituted pandering for the movie, the element of pandering was not present as to the trailer.

We conclude that the prohibited conduct, as to each count of the indictment, came within at least one of the categories set forth in the Redrup case excepting the film from the constitutional protections recognized by that case. The trial court did not err, therefore, in finding the motion picture trailer "Starlet" (legally) obscene. Compare, State, ex rel. Keating v. Vixen, 27 Ohio St. 2d 278.

Assignment of Error No. IV. "The record is totally devoid of any evidence showing: (1) The obscenity of the motion picture trailer "Starlet." (2) That the defendant knew the film was obscene. (3) That the film introduced into evidence is the same film seized on September 17, 1969."

Under the first portion of this assignment, the defendant claims that the televison station program director offered by the State as an expert witness with respect to establishing community standards was not qualified as an expert. It is difficult for this court to conceive of how one becomes an expert on obscenity. Must he be an obscene person, must he be a person who has no tolerance for obscenity, or must he fall in the middle ground between these extremes? What educational or experience requirements are applicable? The determination of the qualifications of an expert witness is a matter for the trier of facts and rulings with respect thereto will ordinarily not be reversed unless there is a clear showing that the court abused its discretion. Cities of Canton, etc. v. Public Utilities Commission, 87 S. Ct. 62, 385 U.S. 828 and In re Ohio Turnpike Commission, 164 Ohio St. 377. The proffered expert was, as a program director, fully familiar with the film fare offered to the public by television stations both locally and nationwide and fully familiar with its acceptability to the public. We are of the opinion that the defendant has not shown a clear abuse of discretion by the trial court in admitting his opinion testimony.

The assertion by the defendant that the record is totally devoid of any evidence showing obscenity is not only well taken because such expert testimony was admissible but also because the subject film trailer was evidence, in and of itself, of its obscenity.

As to the assertion that there is no evidence that the defendant knew the film was obscene, the evidence is fully sufficient to show that the defendant had knowledge of the content and character of the film from which it may be inferred that he knew that it was obscene as a matter of fact. There is no requirement that he be able to arrive at a conclusion that the same was obscene as a matter of law.

As to the identity of the film introduced into evidence it must be remembered, in the first place, that each of the counts with which the defendant was charged relates to the possession of an obscene film. There is no requirement in law that the particular film possessed must be produced in court to prove the commission of the crimes. Indeed, if there is other evidence to prove the elements of the crimes it is conceivable that the charges could be proved without the production of any film, subject only to the best evidence rule which is based primarily on the matter of availability. Although the evidence adduced would have supported an inference that the film produced in evidence was the same film as that which was the subject matter of the charges, the important thing here is not such identity but that the film produced in evidence shows identically the same things that were shown by the film which was the subject matter of the charges and thus tends to be proof, in this case conclusive of its content. The record was replete with evidence of such identity and defendant's claim is without merit.

Having found no error prejudicial to the defendant in any of the particulars assigned and argued the judgment of the trial court must be affirmed.

Judgment affirmed.

YOUNGER, P.J., and COLE, J., concur.